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The Revival of the Right to Property in India

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Abstract

Over the last six decades, the Supreme Court of India has created and re-created a right to property from very weak textual sources, despite constitutional declarations calling for social revolution, numerous amendments to reverse key judgments and even, in 1978, the repeal of the core constitutional provisions guaranteeing a right to property. This Article challenges the usual account of these developments. The primary contention is that the 1978 repeal is much less significant than it appears, due to the Court's creative interpretation of other constitutional provisions. The Supreme Court has consistently advanced liberal models of constitutionalism and property, despite the influence of other models on the original constitutional design and later amendments. This Article also examines whether the Court's liberalism is compatible with the egalitarian values of the Constitution, and how its position will affect attempts to address social issues relating to the distribution of property in India.

At first glance, the constitutional history of the Indian right to property seems to have followed a dramatic arc from independence through to its demise in 1978. The Constituent Assembly incorporated a right to property in the original *Constitution*, although in a form that was believed to exclude judicial review of compensation. Initially, the Supreme Court adopted an interpretive strategy of expanding and defending the right to property, even in the face of constitutional declarations calling for social revolution and several amendments aimed at reversing key judgments. Eventually, the story came to an end with the enactment of the *Forty-Fourth Amendment* in 1978, with its deletion of the core provisions that protected property as one of the *Constitution's* fundamental rights. Since then, there have been calls for the restoration of property as a fundamental right, but nothing of significance has been done to reverse the *Amendment*.

This article challenges this account on several points. The primary contention is that the *Forty-Fourth Amendment* is much less significant than it appears. It has had little impact on property relations in India, as the Supreme Court has ensured that other constitutional provisions provide a right to property that is at least as strong as it ever was, and certainly stronger than it was immediately before the *Amendment*. It has done this through a creative and expansive interpretation of constitutional provisions that were not intended to restrict the legislature's powers over property. Over the long term, the Supreme Court never let go of its conviction that the Indian constitutional order is, above all, based on liberal values that include the property rights of the individual. To be sure, there have been occasional judgments that go against the trend, but over the longer term,

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the Court has preferred the liberal models of constitutionalism and property to social democrat or socialist models.

The story of the right to property from independence to 1978 has been covered in detail by other scholars.¹ This article reviews the pre-repeal developments briefly, before moving to the Supreme Court's position on property since the repeal. It begins in the 1980's, with the rise of the public interest litigation and the movement of the Supreme Court's position on property and access to resources away from the classic liberalism of the earlier period. In many ways, the Court's judgments reflected socialist and social democrat values. However, with the liberalisation of the economy that gathered strength through the 1990's, the Court revived the liberal model of constitutional property through a series of complex doctrinal developments. The article explains these developments, and sets them against the current political directions in India. The article closes with a discussion of the place of a right to property within a political and constitutional system that struggles to address issues of social justice.

It is hoped that the article will help to stimulate academic inquiry on these issues. Although recent developments are significant, and have been noted in the media, they have not captured the attention in the academic literature. Indeed, several recent analyses of the right to property have not discussed the revival of the right to property.² Perhaps this is not surprising: as the article recognises, the right to property is not a fundamental right within the Constitution. Without status as a fundamental right, it lacks the rhetorical and symbolic impact that might otherwise command attention. Moreover, the political context has shifted. Economic liberalisation means that the image of conflict between private property and the State has been supplanted by one of co-operation (legal or otherwise).³ Nevertheless, the revival of the right to property is itself an important and still incomplete chapter in Indian constitutional history.

I. THE EARLY HISTORY OF THE RIGHT TO PROPERTY IN INDIA

¹ Granville AUSTIN, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Oxford University Press, 1966) at 84-99 [Austin, *Cornerstone*]; Granville AUSTIN, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford: Oxford University Press, 2002) [Austin, *Working*]; H.C.L. MERILLAT, "The Indian Constitution: Property Rights and Social Reform" (1960) 21 *Ohio State Law Journal* 616 [Merillat, "Constitution"]; H.C.L. MERILLAT, *Land and the Constitution in India* (New York: Columbia University Press, 1970) [Merillat; *Land*]; Mohammed IMAM, "Changing Contours of Right to Compensation: Part I" (1970) 5(19) *Economic and Political Weekly* 779; Mohammed IMAM, "Changing Contours of Right to Compensation: Part II" (1970) 5(20) *Economic and Political Weekly* 812; R. S. GAE, "Land Law in India: With Special Reference to the Constitution" (1973) 22 *International and Comparative Law Quarterly* 312.

² See e.g. Shruti RAJAGOPALAN, *Economic Analysis of Amendments to the Indian Constitution* (Ph.D. thesis, George Mason University, 2013), online: <<http://digilib.gmu.edu/xmlui/handle/1920/8223>> (the frequent amendment of the *Constitution*, especially in relation to property, undermines the rule of law and ultimately the prospects for economic growth; the analysis does not consider the relevance of Article 300A); Priya S. GUPTA, "The Peculiar Circumstances of Eminent Domain in India" (2012) 49 *Osgoode Hall Law Journal* 445 at 449 (referring to "the absence of constitutional protection for property rights"). See also A.K. GANGULI, "Right to Property: Its Evolution and Constitutional Development in India" (2006) 48 *Journal of the Indian Law Institute* 489 at 521-523.

³ See Namita WAHI, "Land Acquisition, Development and the Constitution" *Seminar Magazine* (February 2013), online: SSRN <<http://ssrn.com/abstract=2222321>>. See also the general discussion below at Part III.

Three very different views on the place of private property in the new constitutional order emerged during the debates in the Constituent Assembly.⁴ The first followed the classic liberal view of property and the constitution. A number of Assembly members spoke in favor of including a right to property, with a guarantee of full compensation on expropriation, within the bill of rights that would form Part III of the new *Constitution*.⁵ Moreover, they argued that the compensation guarantee should apply to all classes of owners and types of property, irrespective of the type of property, the wealth or status of the landowner, or the purpose served by the taking.⁶ At the other extreme, the socialists in the Assembly questioned the place of a right to property amongst the fundamental rights, and were especially concerned that a guarantee of full compensation could make redistribution and nationalisation unaffordable.⁷ They argued that a right to property should go no further than ensuring that public officials stayed within the scope of a defined statutory authority.⁸

The final and largest group believed that India needed a planned economy and a strong state sector, but within a system that still had a role for private capital. This group included most of the Congress leadership.⁹ They shared the concern of European social democrats that the business cycles of an unregulated market put individuals and communities at risk.¹⁰ They did not, however, incorporate social democrat values based on ideas of social obligation and solidarity into the conception of property of constitutional law, as would be seen in countries such as the Federal Republic of Germany and Italy.¹¹ Instead, the constitutional provisions on property were intended to leave the legislature with the discretion to implement socialist and social democrat policies, including ideas of social obligation.¹² As originally drafted, Article 31(1)

⁴ The Constituent Assembly was convened in 9 December 1946; the *Constitution* was agreed on 26 November 1949 and took effect on 26 January 1950. On the right to property, see Austin, *Cornerstone*, *supra* note 1 at 84-99; Merillat, *Constitution*, *supra* note 1.

⁵ E.g. *Constituent Assembly Debates*, vol. IX, 1249-50 (Jaspat Roy Kapoor), 1250-51 (K.T.M. Ahmed Ibrahim) and 1255 (Prabhu Dayal Himatsingka) (10 September 1949).

⁶ E.g. *ibid.*, vol. IX, 1271-73 (Kameshwar Singh of Darbhanga) (12 September 1949).

⁷ E.g. *ibid.*, vol. IX, 1201-06 (Prof Shibban Lal Saxena) (10 September 1949).

⁸ E.g. *ibid.*, vol. IX, 1253-54 (Guptanath Singh) (10 September 1949).

⁹ The two leaders of Congress, Jawaharlal Nehru and Sardar Vallabhbhai Patel are sometimes described as socialist and pro-business, respectively. However, by the time the Constituent Assembly had convened, Nehru had become more moderate (see *infra* notes 27-35). Patel said little about his economic views in the Assembly, except that he did not support full compensation in every case: see Austin, *Cornerstone*, *supra* note 1 at 43 n. 73. See generally Richard SANDBROOK *et al.*, *Social Democracy in the Global Periphery: Origins, Challenges, Prospects* (Cambridge and New York: Cambridge University Press, 2007) at 12-64; cf. Rajagopalan, *supra* note 2 at 92: “The vast majority of the Constituent Assembly were socialists.” (Note that Rajagopalan does not distinguish between socialism and social democracy.)

¹⁰ See Sheri BERMAN, *The Primacy of Politics: Social Democracy and the Making of Europe's Twentieth Century* (Cambridge: Cambridge University Press, 2006).

¹¹ See Tom ALLEN, “Liberalism, Social Democracy and the Value of Property Under the European Convention on Human Rights” (2010) 59 *International and Comparative Law Quarterly* 1055 [Allen, “Liberalism”]; Gregory S. ALEXANDER, “Property as a Fundamental Constitutional Right? The German Example” (2003) 88 *Cornell Law Review* 733.

¹² For an economic analysis of the reasons for taking this position, see Rajagopalan, *supra* note 2 at 66-83.

provides that “[n]o person shall be deprived of his property save by authority of law”, while Article 31(2) provides that:

[n]o property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principle on which, and the manner in which, the compensation is to be determined and given.

Article 31(3) also required Presidential assent for State land reform legislation, thereby providing an additional measure of control, albeit through the national executive rather than the judiciary.¹³ As most legislation would emanate from the State legislatures, the President, as advised by the national Cabinet, would be able to exercise a form of review over takings. It therefore appeared that Article 31(2) did not allow the courts to review the basis for compensation, but they could at least ensure that the legislature had addressed the question. Jawaharlal Nehru, the Prime Minister, informed the Constituent Assembly that “[e]minent lawyers have told us that on a proper construction of this clause, normally speaking, the Judiciary should not and does not come in.”¹⁴ The courts would become involved only where “there has been a gross abuse of the law, where, in fact, there has been a fraud on the Constitution.”¹⁵

It seemed that the right to property would give the legislature considerable flexibility, even to the point of allowing a taking of property for less than full compensation. However, it did not require India or the States to enact socialist or social democrat laws. As Uday S. Mehta has argued, providing a constitutional structure that would enable and even require social progress was a core theme of the Constituent Assembly debates.¹⁶ Ultimately, this was expressed primarily through Part IV of the *Constitution*, entitled the “Directive Principles of State Policy”. The Directive Principles require the India and the States to “secure a social order for the promotion of the welfare of the people”, with a “social order in which justice, social, economic and political, shall inform all the institutions of the national life”.¹⁷ They were also required to bring about a more egalitarian society,¹⁸ with a distribution of resources that would “subserve the common good”¹⁹ in a system that “does not result in the concentration of wealth and means of production to the common detriment”.²⁰ Social provisioning was important, with Directive Principles requiring health care, education, and public assistance.²¹ However, the Constitution also declared that the Principles “shall not be enforceable by any court”,

¹³ The *Constitution* did not set out any principles on which assent would be granted or denied: see Austin, *Working*, *supra* note 1 at 83-87.

¹⁴ *Constituent Assembly Debates*, vol. IX, 1195 (10 September 1949).

¹⁵ *Ibid.*

¹⁶ Uday S. MEHTA, “Constitutionalism” in Niraja Gopal JAYAL and Pratap Bhanu MEHTA, eds., *The Oxford Companion to Politics in India* (Oxford: Oxford University Press, 2010) 15.

¹⁷ *The Constitution of India*, art. 38(1) [*Constitution*].

¹⁸ *Ibid.*, art. 38(2).

¹⁹ *Ibid.*, art. 39(b).

²⁰ *Ibid.*, art. 39(c).

²¹ *Ibid.*, arts. 41, 45.

even though they were “fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”²²

By the usual account of events, a liberal Supreme Court soon came into conflict with the socialist leadership of the Congress Party over the scope of judicial review.²³ This played itself out in cases in which the Court would assert that the right to property required full compensation, only to find that Parliament would pass a constitutional amendment that would cut back the Court’s review powers.²⁴

This perception of neutrality dissolved as the conflict over property developed into a larger conflict over the separation of powers. In 1967, in *Golak Nath v. State of Punjab*, the Supreme Court declared that Parliament did not have the power to enact amendments that would alter the ‘basic features’ or ‘basic structure’ of the Constitution.²⁵ Accordingly, the right to property could not be subject to further amendment. Parliament rejected the Supreme Court’s position; further amendments and cases followed, culminating with the landmark case *Kesavananda v. State of Kerala*.²⁶ The Court affirmed the basic structure doctrine, although it also held that amendments would be acceptable if they did not destroy the “essence” of the right.

In some ways, it is surprising that there was conflict between the Court and Parliament. The rhetoric of the Congress leadership was often socialist, but it tended to assume that economic growth and the ending of colonial privileges would improve the position of the poor without the direct redistribution of wealth. Policies rarely addressed education or health directly; more generally, there was no attention to the ideas of social provisioning that were part of European social democracies. Indeed, nationalism, rather than egalitarianism or redistribution, tended to dominate economic policy.²⁷ Successive five-year plans focused on achieving greater self-reliance through the development of industrial capacity aimed at import substitution.²⁸ In practice, this required close co-operation between private capital and the State, alongside policies aimed at the expansion of the state sector. To be sure, some national policies did increase state control over the private sector, but Vivek Chibber argues that the overall picture is one in which Nehru’s government worked closely with business interests: “Almost every major body set up to design policy and new state institutions in the aftermath of Independence was dominated

²² *Ibid.*, arts. 37.

²³ The Court portrayed itself as following a positivist ideology of judging, especially in relation to the meaning of “compensation”. To some extent this has been accepted by scholars, but it was rejected by the Congress leadership: see the overview in Lavanya RAJAMANI and Arghya SENGUPTA, “The Supreme Court of India” in Niraja Gopal JAYAL and Pratap Bhanu MEHTA, eds., *The Oxford Companion to Politics in India* (Oxford: Oxford University Press, 2010) 80 at 80-83.

²⁴ See the material cited *supra* note 1.

²⁵ *Golak Nath v. State of Punjab*, 1967 SCR (2) 762.

²⁶ *Kesavananda v. State of Kerala*, AIR 1973 SC 1461.

²⁷ Vijay JOSHI and I.M.D. LITTLE, *India Macroeconomics and Political Economy 1964-1991* (Oxford: Oxford University Press, 1994) at 22.

²⁸ See Baldev Raj NAYAR, “State Entrepreneurship in the Nehru Era: Ideology vs Necessity” in Ram JOSHI and R.K. HEBSUR, eds., *Congress in Indian Politics: A Centenary Perspective* (London: Sangam, 1987) 204 at 204.

by business leaders.”²⁹ Indeed, business leaders often favoured strong intervention as a means of obtaining subsidies, licenses and other forms of protection from competition (especially from international competition).³⁰ Ideas of radical reform surfaced in some election campaigns, but they rarely had lasting impact on property. Cases striking down economic legislation were legally and constitutionally significant, but they were not commercially significant, and they certainly did not compromise the growing relationships between commercial interests and the government. Congress and the Court did not agree on the nature of the right to property, but their conflict had limited impact on many key economic policies. Moreover, given the lack of any movement in national politics on redistribution and social provisioning, it is not that surprising that the Supreme Court also failed to advance similar ideas in its interpretation of the right to property.

Even in relation to land reform – a central issue for many decades – Congress often seemed reluctant to take action. The first phase of land reform, involving the abolition of the *zamindari* system, was largely complete by 1960.³¹ However, there was very little progress on other aspects of reform, especially in relation to the redistribution of land. Indeed, Congress had largely distanced itself from redistribution by the time of *Golak Nath*.³² For the most part, the upper caste landowners and wealthy peasants had sufficient influence at the local and regional level to undermine any effort to transfer land or power to the peasants.³³ The Congress leadership was nothing if not pragmatic: as long as the landed elite could deliver electoral success, carrying through on redistribution was unnecessary. Some disenchanted members of Congress made proposals for redistribution at the Nagpur annual meeting of Congress in 1959, but they were blocked by the wealthier peasants who had benefited from the *zamindari* reforms.³⁴ This was the pattern throughout this period:

The very institutions that were supposed to implement government policy – the Congress party machine and the local state organizations – were thoroughly penetrated by groups hostile to agrarian policy. Even the halting attempts at reform tried by Nehru foundered against their resistance.³⁵

²⁹ Vivek CHIBBER, “Organized Interests, Development Strategies, and Social Policies” in R. NAGARAJ, ed., *Growth, Inequality and Social Development in India: Is Inclusive Growth Possible?* (Basingstoke: Palgrave Macmillan, 2012) 168 at 174.

³⁰ Vivek CHIBBER and Adaner USMANI, “The State and the Capitalist Class in India” in Atul KOHLI and Purna SINGH, eds., *Routledge Handbook of Indian Politics* (London: Routledge, 2013) 204 at 204; they also remark that the large public sector was “designed to function at the service of the private sector...Planning was the means by which state assistance to private capital would be effectively coordinated.” *Ibid.* at 206.

³¹ Hung-Chao TAI, *Land Reform and Politics: A Comparative Analysis* (London: University of California Press, 1974) at 214-18.

³² *Ibid.* at 218.

³³ A.M. KHUSRO, “Land Reforms Since Independence” in V. B. SINGH, ed., *Economic History of India: 1857-1956* (Bombay: Allied Publishers, 1965, reprinted 2002); Tai, *supra* note 31 at 93-97.

³⁴ John HARRISS, “Politics and Redistribution in India” in Kohli and Singh, eds., *supra* note 30, 211 [Harriss, “Politics”]; Frederick G. BAILEY, “Politics and Society in Contemporary Orissa” in C.H. PHILIPS, ed., *Politics and Society in India* (London: Allen and Unwin, 1963) 97 ; Atul KOHLI, “State and Redistributive Development in India” in Nagaraj, ed., *supra* note 29, 168 at 187.

³⁵ Vivek CHIBBER, *Organized Interests, Development Strategies, and Social Policies*, in Nagaraj, ed., *supra* note 29, 168 at 170.

Hence, *Golak Nath* and *Kesavananda* may have appeared to obstruct the aims of Congress, especially as both cases related to land redistribution, but they supported the interests of groups that saw the Congress Party as their natural home. The various amendments aimed at restricting the right to property were, in many respects, of limited importance to their supposed beneficiaries.

Regardless of the gulf between reality and perception, there is no doubt that, by the 1970's, the Supreme Court was seen as an obstacle to reform. Not surprisingly, *Golak Nath* had become a target of criticism from Indira Gandhi and the left wing of Congress, especially as Chief Justice Subba Rao left the Court two months later to run for the post of President of India with the conservative Swatantra Party.³⁶ By the 1976 election, the situation had reached the point that the manifesto of the newly-founded Janata Party called for the deletion of the right to property in favor of a right to employment.³⁷ The Court had already indicated that it would not block a repeal, as a slim majority in *Kesavananda* held that the right to property was not part of the *Constitution's* basic structure. Although some Janata members saw the repeal as a necessary step toward socialism,³⁸ Shanti Bhushan, the Law Minister, made it clear that the intention was not to abolish private property or private capital. However, he also stated that:

in a poor country like India where large masses of the people are not propertied people and where only a comparatively small section of the people has property, right to property should not be regarded as fundamental right acting as a restriction on the powers of the Parliament and the elected representatives of the people.³⁹

Indeed, he was concerned that giving property the elevated status of a fundamental right had prevented legislatures from ensuring that "property is used as a medium for doing public good to the people of the country as a whole."⁴⁰

In response to a question in the *Rajya Sabha* (the upper house) about the risks that repealing the right to property might hold for property owners who were not wealthy, Bhushan said that "[a]s far as small holders are concerned...democracy itself is the best safeguard for the protection of their rights to property."⁴¹ The *Forty-Fourth Amendment* therefore repealed the provisions that had guaranteed compensation, but added a new Article 300A. However, the new provision stated only that: "[n]o person shall be deprived of his property save by authority of law."⁴² Significantly, Article 300A lies outside Part III of the *Constitution* and hence it is not a fundamental right. As such, the two central attributes of fundamental rights – that they cannot be taken away or

³⁶ Rajamani and Sengupta, *supra* note 23 at 84; Manoj MATE, "Priests in the Temple of Justice: The Indian Legal Complex and the Basic Structure Doctrine" in Terence C. HALLIDAY, Lucien KARPIK, and Malcolm M. FEELEY, eds., *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (New York: Cambridge University Press, 2012) 112 at 124.

³⁷ *Janata Party Manifesto* (1977) 4(9) Executive Intelligence Review Asia 5.

³⁸ E.g. *Rajya Sabha*, 8 November 1976, col. 119 (Indradeep Sinha); *Rajya Sabha*, 8 November 1976, col. 130 (Maqsood Ali Khan); 8 November 1976, col. 182 (Saraswati Pradhan).

³⁹ *Ibid.*, 28 August 1978, col. 54.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, 28 August 1978, col. 55.

⁴² *Ibid.*, 28 August 1978, col. 54.

contravened by any law,⁴³ and petitioners have a right of direct access to the Supreme Court for their vindication⁴⁴ – would not apply. Since then, it has been assumed that India does not have a constitutional right to property; or, to put it more accurately, it has been assumed that legislation cannot be declared unconstitutional on the sole ground that it does not provide adequate compensation for the taking of property.

II. THE REVIVAL OF THE RIGHT TO PROPERTY

A. *Doctrinal Developments*

The repeal of the right to property was not taken as a licence to expropriate without compensation. However, it did bring an end to the conflict between the judges and legislators over the scope of judicial review, at least in relation to property. This was partly due to a shift in the political landscape. The 1980 election saw a movement back to the center, with Congress (I) campaigning on a commitment to improving administration and reducing corruption. Under Indira Gandhi, and then Rajiv Gandhi, economic policy moved away from the system of licensing and protection that had prevailed under previous governments.⁴⁵ Politically, Congress found it prudent to avoid the politics of property: it did not seek to reinstate the right to property; neither did it put forward policies that might have threatened property.

The Court adjusted its focus away from the review of economic legislation to the review of administrative action and public interest litigation.⁴⁶ Instead of concentrating on a liberal conception of property and equality, it began to show more interest in directing administrative bodies to take action to support the poor. Nevertheless, the groundwork for the revival of the right to property was laid in this period. Arguments for a revival of a right to property were put forward and tested; in general, they were dismissed by the courts, but nonetheless the judgments gave property owners enough hope to continue to argue for a restoration of a right to property that would ensure that no taking could occur without full compensation.

One line of argument looked to the other fundamental rights as a source of protection for property. To some extent, the Court had already established that some other rights were relevant to property. The right to equality, contained in Article 14, had been applied to strike down takings where compensation principles appeared to vary between property owners.⁴⁷ Article 19(1)(g) protected against unreasonable restrictions on the right to carry

⁴³ *Constitution*, *supra* note 17, art. 13(2).

⁴⁴ *Ibid.*, art. 32.

⁴⁵ Joshi and Little, *supra* note 27 at 58-65; John ARMOUR and Priya LELE, “Law, Finance, and Politics: The Case of India” (2009) 43 *Law and Society Review* 491; R. NAGARAJ, “India’s Economic Development” in Kohli and Singh, eds., *supra* note 30, 189.

⁴⁶ See Upendra BAXI, “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India” (1982) 29 *Review of the International Commission of Jurists* 37.

⁴⁷ E.g. *Maharajahdiraja Sir Kameshwar Singh Darghanga v. State of Bihar*, AIR 1951 Patna 91, *aff’d in part, rev’d in part State of Bihar v. Maharajahdiraja Sir Kameshwar Singh Darghanga*, (1952) 1975 AIR 1083 [Kameshwar Singh]; *P. Vajravelu Mudaliar v. Special Deputy Collector, Madras*, 1965 SCR (1) 614.

on a business.⁴⁸ The potential for utilising other fundamental rights in defence of property was greatly increased with *Maneka Gandhi v. Union of India*.⁴⁹ This case came under Article 21, which provides that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law." The Court recognised that the provision was originally intended to apply only to matters of procedure. Nevertheless, it held that the right to personal liberty included a substantive element.⁵⁰ Accordingly, the grounds for a deprivation of liberty also had to be fair, just and reasonable.

By itself, the majority judgment gave heart to those who wished to read substantive obligations into other rights. Even stronger was the concurring judgment of Bhagwati J. He stated that Article 14 implicitly provides a right not to be subject to the arbitrary or unreasonable exercise of state power.⁵¹ In his view, a law that did not provide equal treatment would necessarily be arbitrary in some way, and an arbitrary law was bound to produce some form of unequal treatment at some time.

Both the majority and the concurring judgments described the substantive content in terms that suggested that the interpretation of fundamental rights would not turn on the intricate logic of the construction of detailed provisions. It was the broad sweep of the judgments that was attractive: whether an interference with individual rights had to be "fair, just and reasonable", or neither arbitrary nor unreasonable, it seemed that the Court was willing to re-examine the way in which it had constructed rights in the past. From this, it seemed at least arguable that the new interpretation of Articles 14 or 21 could be extended to expand the scope of Articles 14 and 19(1)(g).⁵²

The Court considered this point in *Minerva Mills v. Union of India*.⁵³ The petitioner argued that the compensation paid on the nationalisation of its spinning mills was inadequate to the point that the relevant statutory provisions were arbitrary and contrary to Article 14.⁵⁴ In effect, it was attempting to use Article 14 to do the work of a right to property, as Bhagwati J's *obiter dicta* suggested it could. Ultimately, the Court dismissed its claim on the facts, but without indicating whether it would uphold a similar argument on different facts.⁵⁵

The case is better known for its analysis of the basic structure doctrine. However, the relevant statute included a declaration that it was enacted in furtherance of the Directive Principles. By the Forty-Second Amendment,⁵⁶ Article 31C excluded judicial review from any statute with such a declaration. The case therefore raised two issues: whether Article 14 could be used to challenge a taking, and if so, whether Article 31C was effective to exclude judicial review.

⁴⁸ *Constitution*, *supra* note 17, arts. 30(1A) and 30A(1) were also relevant, as they contained guarantees of compensation for takings in specific circumstances.

⁴⁹ *Maneka Gandhi v. Union of India*, 1978 SCR (2) 621.

⁵⁰ See Manoj MATE, "The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases" (2012) 28 Berkeley Journal of International Law 216.

⁵¹ See also Bhagwati, J in *Ramana Dayaram Shetty v. The International Airport Authority of India*, 1979 SCR (3) 1014 at 1031-32 (the principle of non-arbitrariness is also part of the general principles of the rule of law).

⁵² See generally e.g. *ibid*.

⁵³ *Minerva Mills v. Union of India*, 1981 SCR (1) 206.

⁵⁴ *Sick Textile Undertakings (Nationalisation) Act, 1974*, No. 57 of 1974.

⁵⁵ *Minerva Mills v. Union of India*, 1986 SCR (3) 718.

⁵⁶ *Constitution (Forty-Second Amendment) Act, 1976*, s. 4.

A leading constitutional scholar, H.M. Seervai, put forward a second argument in favor of an implied right to property. His argument followed from India's federal structure. Article 246 allocates legislative powers to each of Parliament and the state legislatures, as set out in the Seventh Schedule to the *Constitution*. Entry 42 of List III of the Schedule provides that Parliament and the state legislatures are competent to legislate for the "acquisition and requisitioning of property". Seervai argued that Entry 42 embodied the power of eminent domain, which could only be understood as a power to acquire only for a public purpose and on payment of compensation.⁵⁷ Hence, a taking would not have statutory authority if it were not for a public purpose or accompanied by compensation; as such, it would be contrary to Article 300A.

Another leading scholar, Durga Das Basu, challenged Seervai on the basis that the constitutional language was clear:⁵⁸ if the relevant legislation did not provide compensation "the validity of such law cannot be challenged before the superior Courts on the ground that no compensation has been paid or made payable by such law."⁵⁹ Furthermore, he argued that there is no authority for reading Entry 42 as the power of eminent domain, or even for supposing that the principles of eminent domain are part of Indian constitutional law. As he put it, Seervai's argument to the contrary is "an astounding proposition."⁶⁰

The lower courts, like the scholars, were divided on the effect of Article 300A. In 1980, the Gujarat High Court gave a very clear statement against reading substantive guarantees into Article 300A:

It is difficult to imagine how constitutional challenge under Article 300A can be raised. It is a very simple Article which can hardly be pressed into service for challenging any statute...It affords constitutional protection to a right to property which a statute recognizes. If a statute does not recognize a right to property, Article 300A cannot be invoked. Much less, therefore, any provision of the impugned Act can be challenged under Article 300A.⁶¹

In a similar vein, the Rajasthan High Court held that price controls did not violate Article 300A, simply because the controls had statutory backing. The fairness of the controls did not enter into the question.⁶²

The Bombay High Court took the opposite line in *Basantibai Fakirchand Khetan v. State Of Maharashtra*, as it declared that the *Forty-Fourth Amendment* was not intended to take away the "natural right to hold property."⁶³ If the *Constitution* allowed a taking

⁵⁷ M. SEERVAI, *Constitutional Law of India*, 4th ed (Bombay: NM Tripathi, 1991-1993) vol. 2 at 1354-427; see also H.M. JAIN, "The Forty Fourth Amendment and the Right to Property" (1979) 13 *Journal of Constitutional and Parliamentary Studies* 23.

⁵⁸ Durga Das BASU, *Shorter Constitution of India*, 12th ed (New Delhi: Wadhwa, 1996 reprint 1999) at 873-77. See also Jaivir SINGH, "Separation of Powers and the Erosion of the 'Right to Property' in India" (2006) 17 *Constitutional Political Economy* 303 at 312 ("Thus, while Article 300 A has been perceived as a protection of private property against executive action, there is no such protection from the intentions of a legislature particularly in relation to 'inadequacy of compensation' set by the legislature.").

⁵⁹ Basu, *supra* note 58 at 868; see also 872.

⁶⁰ *Ibid.* at 873 (Basu was critical of the repeal, but felt that the language was clear.)

⁶¹ *Vora Saiyedbhai Kadarbhai v. Saiyed Intajam Hussien Sedumiya*, (1981) 22 GLR 596 at para. 53.

⁶² *Mutha Parasmal Jain v. Union of India*, AIR 1981 Raj 139.

⁶³ *Basantibai Fakirchand Khetan v. State of Maharashtra*, AIR 1984 Bom 366 at para. 19.

with compensation, or not for a public purpose, “the entire concept of rule of law would be redundant.”⁶⁴ The Court located the right to property in Article 300A, rather than the fundamental rights, holding that:

The legislation must be just, fair and reasonable whether protection of Arts. 14 and 19 is available or otherwise, and the submission that the legislation providing for deprivation of property under Art. 300A of the Constitution must be just, fair and reasonable deserves acceptance.⁶⁵

The High Court’s reading of Article 300A also had the rather odd effect of avoiding the constitutional amendments that Parliament had enacted to protect economic and land reform legislation from judicial review. For example, the Supreme Court in *Minerva Mills* held that Article 31C could not completely exclude judicial review of legislation under Article 14; however, if a similar case came forward under Article 300A, the High Court’s judgment suggests that Article 31C would have no effect.⁶⁶

Basantibai Fakirchand Khetan was overruled by the Supreme Court, on the basis that Article 300A was not in force when the legislation was enacted.⁶⁷ The Court also stated that, in any case, the statute was fair, just and reasonable.⁶⁸ It thereby avoided making any statement on the High Court’s views on Article 300A.⁶⁹ However, there is evidence that, if it had found it necessary to do so, it would have cast doubt on the Bombay High Court’s interpretation of Article 300A.⁷⁰ In *Bhim Singh v. Union of India*, for example, Iyer J. was emphatic in denying that the pre-repeal right to property under Article 31(2) required full compensation or even fair compensation.⁷¹ The petitioners challenged a legislative cap of 2 lakhs rupees (about \$US 25,000 at that time) on compensation for land, but Iyer J. declared that “short of paying a ‘farthing for a fortune’ the question of compensation is out of bounds for the court to investigate.”⁷² He said that, in the Indian context, where “half of humanity lives below the breadline, to regard Rs. 2 lakhs as a farthing is farewell to poignant facts and difficult to accept.”⁷³ Indeed, property could be taken “not for a return, but for almost free, if the justice of the situation commended itself to the legislation to take it that way.”⁷⁴

Iyer J. also considered Article 14: on its face, there may have been a violation of its guarantee of formal equality, but Parliament had used the device of adding the legislation to the Ninth Schedule. By the *First Amendment*, legislation added to the Ninth Schedule

⁶⁴ *Ibid.* at para. 19.

⁶⁵ *Ibid.* at para. 22.

⁶⁶ *Ibid.* at para. 24.

⁶⁷ *State of Maharashtra v. Basantibai Mohanlal Khetan*, 1986 SCR (1) 707 at 729. The legislation is the *Maharashtra Housing and Development Act, 1976*, No. 28 of 1977.

⁶⁸ *Ibid.* at 726.

⁶⁹ *Ibid.* at 729.

⁷⁰ See also *State of Karnataka v. Ranganatha Reddy*, 1978 SCR (1) 641; *Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal Ltd.*, 1983 SCR (1) 1000; *Waman Rao v. Union of India*, 1981 SCR (2) 1.

⁷¹ *Bhim Singh v. Union of India* 1985 SCR Supl (1) 862 [*Bhim Singh*]. Krishna Iyer J. delivered a concurring judgment, but in the short judgment for the majority, Chandrachud C.J. expressed agreement with Iyer J.’s reasons.

⁷² *Ibid.* at 881; the cap was under the *Urban Land (Ceiling and Regulation) Act, 1976*, No. 33 of 1976. As the claim was filed before the *Amendment*, the Court decided it against the prior law.

⁷³ *Bhim Singh*, *supra* note 71 at 884.

⁷⁴ *Ibid.* at 883.

was immune from review under Article 14 (or the right to property). Under the basic structure doctrine, the Court might have allowed review. However, in considering the facts, Iyer J. stated that only a violation of Article 14 that amounted to “a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice” would make the doctrine applicable.⁷⁵ In comparing the relief of poverty with equality under Article 14, he asked “[w]hich is more basic? Eradication of die-hard, deadly and pervasive penury degrading all human rights or upholding of the legal luxury of perfect symmetry and absolute equality attractively presented to preserve the status quo ante?”⁷⁶

Iyer J.’s judgment reflected a broader turn to social activism in the Court of the 1980’s. In the landmark case *Olga Tellis v. Bombay Municipal Council*,⁷⁷ the Court considered whether the right to life in Article 21 prevented the Bombay Municipal Council from relocating pavement dwellers who had migrated into the city to look for work. Previously, Article 21 had been read as a narrow prohibition against capital punishment. In *Tellis v. Bombay*, the Supreme Court extended Article 21 to the “means of living”, on the basis that the right to life protects “something more than mere animal existence”. Accordingly, “the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed.”⁷⁸ Hence, the Municipal Council could not simply evict the pavement dwellers because they lacked a formal interest in their dwelling spaces.

Tellis v. Bombay is interesting because Article 21 was invoked to protect access to a dwelling space. To be sure, the protection was carefully circumscribed: the judgment does not confer a proprietary interest; at most, eviction was delayed until the pavement dwellers could find alternative accommodation.⁷⁹ Indeed, in other cases, it was careful to ensure that Article 21 did not develop into a new form of the liberal right to property.⁸⁰ Nevertheless, Bombay could not treat the pavement dwellers as though they had no standing at all. Access to space, especially for a home, is relevant to fundamental rights; and the social context in which it exists is also relevant. This reflects some of the thinking that goes into a social democrat vision of a right to property. That is, for social democrats, part of the social function of property lies in the protection of access and control over space and resources, and a constitutional right to property limits the state’s power to modify existing arrangements over access and control. As such, whilst not directly about property, *Tellis v. Bombay* suggests that the Court was showing more concern for ideas of social obligation and solidarity, and an awareness of the relationship between access to resources and the capacity to lead a meaningful life.

⁷⁵ *Ibid.* at 889.

⁷⁶ *Ibid.* at 890.

⁷⁷ *Olga Tellis v. Bombay Municipal Council*, 1985 SCR Supl (2) 51 [*Tellis v. Bombay*]; see Jessie H. HOHMANN, “Visions of Social Transformation and the Invocation of Housing Rights in Mumbai: The Struggle for the Right to Housing” (2010) 13 Yale Human Rights and Development Law Journal 135.

⁷⁸ *Tellis v. Bombay*, *ibid.* at 79.

⁷⁹ *Ibid.* at 87.

⁸⁰ See *Ambika Prasad Mishra v. State of Uttar Pradesh*, 1980 SCR (3) 1159 at 1168 (Iyer J) (“The dichotomy between personal liberty, in Article 21, and proprietary status, in Articles 31 and 19 is plain, whatever philosophical justification or pragmatic realisation it may possess in political or juristic theory.”). See also *State of Maharashtra v. Basantibai Mohanlal Khetan*, 1986 SCR (1) at 730.

The overall picture is therefore that, to the mid-1990s, the Supreme Court carefully avoided re-creating a constitutional right to compensation or substantive fairness. It did not reject the liberal vision outright, but neither did it advocate it with the vigour of the earlier period. The Bombay High Court's judgment in *Basantibai Fakirchand Khetan* seemed anomalous. However, the political climate was changing. The exchange crisis of 1991 led to a dramatic acceleration of the liberalisation programme. If, in the post-repeal period, the Court had become more receptive to redistributive policies, it now seemed that Congress was moving away from them. The Court soon followed.

This became evident, in 1995, in *Jilubhai Nanbhai Khachar v. State Of Gujarat*.⁸¹ In a key development, it treated Article 300A as a positive grant of the power of eminent domain. By the reasoning of Seervai, this would necessarily require a taking of property to serve a public purpose and to be conditional on payment of compensation. However, perhaps mindful of the earlier controversies, the Court was cautious on compensation. It held that it was only necessary to pay an amount that was not "illusory".⁸² Nevertheless, the reasoning is not as clear as it could be, as the Court also stated that Article 300A "resuscitated" elements of the old right to property, but not the sections that provided for compensation. Hence, it followed that the argument that Article 300A incorporated an obligation to compensate was "untenable".⁸³ Plainly, there was some confusion over the effect of Article 300A, especially in relation to compensation. Nevertheless, behind the confusion, it was again clear that Article 300A was not merely a limit on executive power: it also enabled judicial review of legislation.

In *Jilubhai Nanbhai Khachar*, the Court ultimately decided that the legislation did not violate Article 300A.⁸⁴ As with *Minerva Mills*, it appeared that declarations of unconstitutionality would be very rare in property cases. However, the judgment was soon followed by *State of Tamil Nadu v. Ananthi Ammal*.⁸⁵ In this case, for the first time since the *Forty-Fourth Amendment*, the Court struck down provisions of takings legislation on substantive grounds. The offending provisions authorised the payment of compensation by installment, which the Court found "unreasonable" and hence contrary to Article 14.⁸⁶ The Court did not explain why the provisions on installment payments were unreasonable, or why it relied on Article 14 rather than Article 300A, but it was clear that it was becoming more willing to scrutinise property legislation.

In cases subsequent to *State of Tamil Nadu v. Ananthi Ammal*, the Court consistently affirmed its power to review legislation to protect property. In a series of cases, it declared that Article 300A provided an independent right to property, as part of the conferral of the power of eminent domain. Moreover, it cast aside its earlier reticence on

⁸¹ *Jilubhai Nanbhai Khachar v. State Of Gujarat*, AIR 1995 SC 142; 1994 Supp(1) SCR 807 [*Jilubhai Nanbhai Khachar*]. See Diwakar AGARWAL and Vikram RAGHAVAN, "Jilubhai Nanbhai Khachar v State Of Gujarat, AIR 1995 SC 142: A Review" (1996) 9 Central India Law Quarterly 96 (supporting the revival of a right to property); Singh, *supra* note 58 at 318.

⁸² *Jilubhai Nanbhai Khachar*, *ibid.* at para. 19.

⁸³ *Ibid.* at para. 33; see also para. 51.

⁸⁴ *Bombay Land Revenue Code and Land Tenure Abolition Laws (Gujarat Amendment) Act, 1982*, No. 8 of 1982.

⁸⁵ *State of Tamil Nadu v. Ananthi Ammal*, 1995 AIR 2114.

⁸⁶ *Ibid.* at para. 17.

compensation. In 2005, in *Hindustan Petroleum Corpn Ltd v. Darius Shapur Chenai*, the Court stated that:

[h]aving regard to the provisions contained in Article 300A of the Constitution of India, the State in exercise of its power of 'eminent domain' may interfere with the right of property of a person by acquiring the same but the same must be for a public purpose and reasonable compensation therefor must be paid.⁸⁷

In 2006, in *State Of Bihar v. Project Uchcha Vidya, Sikshak*, it stated that “Article 300-A embodies the 'doctrine of eminent domain' which comprises of two parts, (i) acquisition of property in public interest; and (ii) payment of reasonable compensation therefor.”⁸⁸ More broadly, the Court stated that the regulation of property was subject to general principles of reasonableness and proportionality. In *Chairman, Indore Vikas v. M/S Pure Industrial Cock & Chem.*, the Court confirmed this approach, as it declared that zoning classifications could not be sustained if they imposed “unreasonable restrictions”. It also stated that “[t]he courts must make an endeavour to strike a balance between public interest on the one hand and protection of a constitutional right to hold property, on the other.”⁸⁹ Then, in *M/S Entertainment Network v. M/S Super Cassette Industries Ltd.* it declared that “[i]n terms of Article 300A of the Constitution, it [the right to property] may be subject to the conditions laid down therein, namely, it may be wholly or in part acquired in public interest and on payment of reasonable compensation.”⁹⁰

Collectively, these cases are alike in the absence of any reasoned justification for importing substantive standards into Article 300A. Indeed, they do not even acknowledge the possibility that Article 300A does not include such standards. Plainly, they indicate a trend toward giving Article 300A substantive content. However, it should be noted that the majority of these cases were decided by a bench of only two judges, with the same judge (S.B. Sinha) delivering the judgment of the Court.⁹¹ These cases are significant, but it is fair to say that they do not constitute a strong line of authority. However, in *K.T. Plantation Pvt. Ltd. v. State of Karnataka*,⁹² a bench of five judges⁹³ delivered a detailed

⁸⁷ *Hindustan Petroleum Corpn Ltd v. Darius Shapur Chenai*, (2005) 7 SCC 627, at para. 6 [*Hindustan Petroleum*].

⁸⁸ *State Of Bihar v. Project Uchcha Vidya*, 2006 (2) SCC 545 at para. 65 [*Bihar v. PUV*].

⁸⁹ *Chairman, Indore Vikas v. M/S Pure Industrial Cock & Chem.*, (2007) 8 SCC 705, at para. 47 [*Chairman, IV*].

⁹⁰ *M/S Entertainment Network v. M/S Super Cassette Industries Ltd.*, 2008 (9) SCALE 69, at para. 77 [*M/S Entertainment*].

⁹¹ *Hindustan Petroleum*, *supra* note 87; *Bihar v. PUV*, *supra* note 88; *Chairman IV*, *supra* note 89; *M/S Entertainment*, *supra* note 90. It is interesting to note that the National Commission to Review the Working of the Constitution, which included a number of retired senior judges, recommended that Article 300-A be amended to the following: “300-A (1) Deprivation or acquisition of property shall be by authority of law and only for a public purpose. (2) There shall be no arbitrary deprivation or acquisition of property ...” (Further provisions would have covered Scheduled Castes and Scheduled Tribes.) National Commission to Review the Working of the Constitution, *Report of the National Commission to Review the Working of the Constitution* (Ministry of Justice, 2002) at para. 3.16.2. The Commission did not explain why it made its recommendation, but it is worth noting that the proposed paragraph (2) seems to introduce the same substantive standard as found in Article 14.

⁹² *K.T. Plantation Pvt. Ltd. v. State of Karnataka*, [2011] 13 (ADDL) SCR 636 [*KT Plantation*].

⁹³ S.H. Kapadia, Mukundakam Sharma, K.S. Radhakrishnan, Swatanter Kumar, Anil R. Dave, JJ.

analysis of Article 300A confirming these developments. The reasoning and doctrine are not particularly clear, and are worth examining in some detail.

B. K.T. Plantation, Article 300A, and the Right to Property

In *K.T. Plantation*, the Court acknowledged that the *Forty-Fourth Amendment* removed the right to compensation from the fundamental rights in Part III of the *Constitution*.⁹⁴ However, it asked whether the Amendment “completely obliterated” the principles of eminent domain.⁹⁵ The Court observed that Article 300A does not contain any express reference to the principles of eminent domain. Nevertheless, it declared that the principles of eminent domain, including the right to compensation, could be “inferred” into Article 300A.⁹⁶

Plainly, this is a highly significant step. It is therefore remarkable that the Court reached made it with virtually no analysis. As explained above, it is quite clear that Article 300A was only intended to require legislative authority for a deprivation of property. The Court referred to the leading historical figures on eminent domain, such as Grotius, Pufendorf, Locke, Rousseau and Blackstone,⁹⁷ as well as the *Constitutions* of the United States, Germany, Australia, Canada, the United Kingdom and the European Convention on Human Rights.⁹⁸ It seems that the Court did so to demonstrate that the Indian constitutional order is fundamentally liberal, and that such an order must have a justiciable right to property (even though, as the Court noted, some jurisdictions do not have justiciable rights to property).⁹⁹ Once the Court took this point of view, it seemed to follow that the *Forty-Fourth Amendment* did not remove the right to property from the *Constitution*. Instead, by moving it out of the chapter on fundamental rights, it adjusted the remedies and procedure that apply to a breach, but it went no further.

The Court also considered the basic structure doctrine in the context of property. It is not clear why it did so: the doctrine is used to overcome a constitutional amendment that excludes judicial review. In *K.T. Plantation*, no such amendment was relevant to the case. However, it seemed that the Court wished to comment on the line of cases beginning with *Minerva Mills* and culminating with *I.R. Coelho v. State of Tamil Nadu*¹⁰⁰ and *Glanrock Estate Ltd v. The State of Tamil Nadu*,¹⁰¹ where it confirmed that a taking of property could violate fundamental rights, and that an amendment intended to insulate the relevant legislation from judicial review could violate the basic structure doctrine. To be sure, the Court has been careful to explain that it would be unusual to find that a taking could give

⁹⁴ Subject to the specific exceptions in Articles 30(1A) (property of educational institutions established by minorities) and 31A(1) (certain smallholdings under personal cultivation) of the *Constitution*, *supra* note 17.

⁹⁵ *K.T. Plantation*, *supra* note 92, para. 115.

⁹⁶ *Ibid.*, para. 115; see also para. 121: “the right to claim compensation or the obligation to pay, though not expressly included in Article 300A, it can be inferred in that Article and it is for the State to justify its stand on justifiable grounds which may depend upon the legislative policy, object and purpose of the statute and host of other factors.”

⁹⁷ *Ibid.*, para. 84-91.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, para. 84-85.

¹⁰⁰ *I.R. Coelho v. State of Tamil Nadu*, 2007 AIR 861, 2007 (1) SCR 706, 2007 (2) SCC 1 [*IR Coelho*].

¹⁰¹ *Glanrock Estate Ltd v. The State of Tamil Nadu*, (2010) 10 SCC 96 [*Glanrock Estate*].

rise to a judgment that the basic structure had been undermined. Indeed, as the Court explained in *Glanrock Estate*, it is possible for a constitutional amendment to shield a violation of a fundamental right from judicial review without necessarily violating the basic structure of the Constitution. One example of particular importance for property concerns equality and egalitarianism. Egalitarian values are part of the basic structure of the *Constitution*: they are expressed in Article 14, but egalitarianism goes beyond Article 14.¹⁰² Indeed, in some situations, formal equality under Article 14 might even conflict with the pursuit of a more egalitarian society.¹⁰³ In such a case, an amendment could shield the legislation from review without violating the basic structure doctrine.

Unfortunately, in *K.T. Plantation*, the Court's discussion of the basic structure doctrine produces confusion rather than clarification. It seemed unable to make the fundamental distinction between the review of legislation and the review of an amendment that shields legislation from review. It stated that, in relation to property, "[o]n deletion of Article 19(1)(f) the available grounds of challenge are Article 14, the basic structure and the rule of law, apart from the ground of legislative competence."¹⁰⁴ It did not say whether the "challenge" is to legislation or a constitutional amendment. The first ground – Article 14 – is relevant to a challenge to legislation, but not necessarily to a challenge to a constitutional amendment (as the Court noted in *Glanrock Estates*). If the Court intended to refer to the review of amendments, Article 14 might be relevant as an instance of the more general principle of egalitarianism; but if so, this is properly part of the basic structure doctrine, which the Court identified as a separate ground. But equally, if the Court was saying that Article 14 is a general ground for reviewing property legislation, why did it concentrate on Article 300A in the rest of its judgment? The second ground – the "basic structure and the rule of law" – is only relevant to the review of a constitutional amendment.¹⁰⁵

The third ground – "legislative competence" – could be a basis for either kind of review. Indeed, this is the basis of the Court's position on Article 300A as the source of the power of eminent domain. If, however, the challenge is to a constitutional amendment, the question of competence would fall under Article 368. This provision gives Parliament the exclusive power to amend the Constitution. It also describes the process for amending the Constitution. Hence, the Court could strike down an amendment on the basis of a lack of competence if Parliament failed to pass it with a two-thirds majority, as required by Article 368. The reference to legislative competence (like the references to Article 14, the basic structure doctrine and the rule of law) is therefore not incorrect, although it is ambiguous and confusing.

The conflation in *K.T. Plantation* of the review of legislation and the review of constitutional amendments does not detract from the importance of the Court's reading of Article 300A. It leaves it impossible to determine *why* the Court has revived the right to property, but no doubt that it has done so.

¹⁰² See, *ibid.* at para. 8.

¹⁰³ *Kameshwar Singh*, *supra* note 47, is an example.

¹⁰⁴ *K.T. Plantation*, *supra* note 92, para. 134.

¹⁰⁵ See *Ashoka Kumar Thakur v. Union Of India*, (2008) 6 SCC 1 at para. 191: "legislation cannot be challenged simply on the ground of unreasonableness because that by itself does not constitute a ground."

C. *The Content of the Right to Property*

The Court in *K.T. Plantation* also considered the content of the right to property under Article 300A. In a significant passage, the Court described its substantive content as follows:

Article 300A enables the State to put restrictions on the right to property by law. That law has to be reasonable. It must comply with other provisions of the Constitution. The limitation or restriction should not be arbitrary or excessive or what is beyond what is required in public interest. The limitation or restriction must not be disproportionate to the situation or excessive. The legislation providing for deprivation of property under Article 300A must be “just, fair and reasonable” as understood in terms of Articles 14, 19(1)(g), 26(b), 301, *etc.*¹⁰⁶

By holding that all laws affecting property are subject to review against general standards of reasonableness, the Court resurrected the pre-repeal right to property in its most generous interpretation.¹⁰⁷ Indeed, the contrast with the comments of Iyer J. in *Bhim Singh* is quite striking.¹⁰⁸ However, the Court also indicated that it would not apply these standards rigidly:

Measures designed to achieve greater social justice, may call for lesser compensation and such a limitation by itself will not make legislation invalid or unconstitutional or confiscatory. ... in each case, the scheme of the impugned Act, its object, purpose as also the question whether payment of nil compensation or nominal compensation would make the impugned law unjust, unfair or unreasonable in terms of other provisions of the Constitution as indicated above.¹⁰⁹

These principles are broad enough to allow a number of different approaches to compensation. They could, for example, lead the Court to the position Jawaharlal Nehru took in the Constituent Assembly debates. He agreed that full compensation should be paid for the “petty acquisitions” involved in small-scale public projects, but not in situations where the legislature embarked on “large schemes of social reform, social engineering etc.”¹¹⁰ In such cases, the legislature would normally act because the market was operating in a manner that did not serve the public interest; hence, it would make little sense to honor the market by paying full compensation. However, he then commented on the threat from private power, and in particular from powerful monopolies, who:

can crush out the little shop-keeper by their methods of business and by the fact that they have large sums of money at their command ... he may possess property, but it may mean nothing to him, because some monopoly comes in the way and prevents him from the enjoyment of his property.¹¹¹

¹⁰⁶ *K.T. Plantation*, *supra* note 92 at para. 122.

¹⁰⁷ See the material cited *supra* note 1.

¹⁰⁸ *Supra* note 71.

¹⁰⁹ *Ibid.*, paras. 121 and 122.

¹¹⁰ *Constituent Assembly Debates*, vol. IX, 1194 (10 September 1949).

¹¹¹ *Ibid.*, 1196.

Only a strong State could protect the vulnerable from monopolies and their power over the market. In some cases, this would require "large schemes of social reform, social engineering etc.", including the nationalisation of key industries.¹¹² In these cases, the legislature would need the discretion to set compensation to ensure that it would be able to protect the vulnerable. Ultimately, he could not see how these two situations could be distinguished, and hence he argued for complete discretion for all types of takings. However, under the current doctrine, the Court might seek to develop principles for drawing a distinction between them.

Conversely, if the Court returns to its jurisprudence of the 1950's and 60's, it is likely to say that the pursuit of social justice may justify a taking, but paying less than the market value for the property would be "unjust, unfair or unreasonable" to the owner. The Court's recent tendency to describe property as a "human right" suggests that it is moving in this direction.¹¹³ Indeed, the language that it has used to describe the content of Article 300A is similar to that of the European Court of Human Rights on the right to property under the European Convention on Human Rights.¹¹⁴ Like the framers of the Indian *Constitution*, the framers of the European Convention avoided substantive guarantees in order to protect the capacity of the legislature to pursue social and economic legislation.¹¹⁵ Over time, however, the Court of Human Rights moved the Convention's right to property closer to the liberal model. Doctrinally, the right to property is now subject to the same general standard of proportionality as other Convention rights.¹¹⁶ In the leading cases, *James v. The United Kingdom*¹¹⁷ and *Lithgow v. The United Kingdom*,¹¹⁸ the Court declared that the right to property required a "fair balance", and this would normally require payment of an amount reasonably related to the value of the property.¹¹⁹ Plainly, this is similar to the formula in *K.T. Plantation* and may give some indication of the thinking of the Indian Supreme Court.

In both *James* and *Lithgow*, as in *K.T. Plantation*, exceptions to the general rule of full compensation were permitted. In *James v. The United Kingdom*, the European Court of Human Rights suggested that the property owners did not have a claim to full compensation because some of the value of the property was attributable to expenditure

¹¹² *Ibid.*, 1194.

¹¹³ E.g. *Karnataka State Financial Corporation v. N. Narasimhaiah*, (2008) 5 SCC 176 at para. 30 ("Right of property, although no longer a fundamental right, is still a constitutional right. It is also human right."); *State of Haryana v. Mukesh Kumar*, [2011] 14 (ADDL) SCR 211, 230-31; *N. Padmamma v. S. Ramakrishna Reddy*, (2008) 15 SCC 517, at para. 17; *Rajendra Nagar Adarsh Grah Nirman Sahkari Samiti Ltd v. State Of Rajasthan*, [2013] 7 SCR 192, at 213-14; *Chandigarh Housing Board v. Devinder Singh*, (2007) 9 SCC 67, at para.11; *Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan*, AIR 2009 SC 103, at para. 26; *Lachhman Dass v. Jagat Ram*, (2007) 2 SCR 980, at para. 16; *P. T. Munichikkanna Reddy v. Revamma*, (2007) 6 SCC 59 at para. 51; *Chairman, Indore Vikas*, *supra* note 89, at paras. 54, 56.

¹¹⁴ E.g. *P. T. Munichikkanna Reddy v. Revamma*, *supra* note 113 at paras. 51-56 and *Hemaji Waghaji Jat*, *supra* note 113 at para. 26 for examples of borrowing from the Convention case law.

¹¹⁵ See A.W.B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2004) at c. 15.

¹¹⁶ See Allen, "Liberalism", *supra* note 11.

¹¹⁷ *James v. The United Kingdom* (1986), 98 ECHR (Ser. A) [*James*].

¹¹⁸ *Lithgow v. The United Kingdom* (1986), 102 ECHR (Ser. A) [*Lithgow*].

¹¹⁹ *James*, *supra* note 117 at 36; *Lithgow*, *supra* note 118 at 51.

by their tenants, who had been given the right to acquire the freeholds. In *Lithgow*, it held that the scale and impact of the nationalisation of an industry meant that the ordinary principles could not be rigidly applied. These outcomes would have been consistent with the position taken by Nehru in the Constituent Assembly. However, in more recent cases, the Court of Human Rights has become more liberal and much less willing to accommodate the social democrat values that led the framers to avoid including substantive guarantees in the right to property.¹²⁰ In *Radovici and Stănescu v. Romania*,¹²¹ for example, the Court declared that a State could not require property owners to take on the burden of providing social justice. In relation to the regulation of tenancies during a housing shortage, the Court stated that:

the legitimate interests of the community in such situations call for a fair distribution of the social and financial burden involved in the transformation and reform of the country's housing supply. *This burden cannot, as in the present cases, be placed on one particular social group, however important the interests of the other group or the community as a whole.*¹²²

In effect, social provisioning can only be achieved through general funds. In practice, social welfare for the poor is set against the willingness of the wealthy to pay taxes. This is, of course, the classic liberal view of the right to property: governments may take property when authorised, but the conception of a right to property focuses on the needs and claims of the owner. It is free of social obligations that would allow for re-definition and adjustment of entitlements in the light of the social context. As such, the human rights conception of property becomes part of a political ideology that makes the furtherance of social and economic rights conditional on budgetary capacity of the State, rather than the dignity of the individual.¹²³ By this reasoning, adequate social provisioning can be delayed indefinitely.¹²⁴

D. The Scope of the Right to Property

K.T. Plantation raises a further question about Article 300A. The case itself dealt with the exercise of the power of eminent domain. But does the reasoning go further than that? Could it be argued that the reasoning of *K.T. Plantation* supports the conclusion that Article 300A provides a general right to property, applicable to any form of interference with property, including those that are not exercises of the power of eminent domain?

On the facts, it was not necessary for the Court to address this question; nevertheless, there is a strong argument that the conclusion does indeed follow from its reasoning. The core principle of Article 300A is legality: no one can be deprived of private property without the authority of law. Although the Court's immediate concern was with the

¹²⁰ See Allen, "Liberalism", *supra* note 11.

¹²¹ *Radovici and Stănescu v. Romania*, nos. 68479/01, 71351/01, and 71352/01, [2006] ECHR.

¹²² *Ibid.*, para. 88 (emphasis added); see also *Hutten-Czapska v. Poland*, no. 35014/97, [2006] ECHR [GC].

¹²³ See Balakrishnan RAJAGOPAL, "Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective" (2007) 8 Human Rights Review 157; Paul O'CONNELL, "The Death of Socio-Economic Rights" (2011) 74 Modern Law Review 532 at 545-548.

¹²⁴ Michael WALTON, "Can a Social Democratic Resolution Tackle Inequality and Support Growth for India?" (2011), online: Michael Walton <http://www.michaelwalton.info/wp-content/uploads/2011/08/Walton_Social-democracy-and-inequality_July2011.pdf>.

exercise of the power of eminent domain, the language of Article 300A and its forerunner in Article 31(1) demonstrate that it expresses a principle of general application. Indeed, the Court acknowledges this point by stating that “Article 300A enables the State to put restrictions on the right to property by law.” Expressed in this way, Article 300A is not limited to takings under the power of eminent domain. Instead, it was intended to ensure (at a minimum) that the deletion of Article 31(1) did not allow the executive to act against property without the authority of law.

This leads to a more controversial question: does the principle of reasonableness apply to all forms of interference with property? Here, there are two different models that illustrate the importance of this question. In the United States, the takings clause provides a substantive guarantee (public purpose, and just compensation), but only in respect of exercises of the power of eminent domain.¹²⁵ It falls under the more general right to due process, which applies to all forms of interference with property. However, the more general right is only concerned with the procedure by which public authorities purport to exercise power over property.¹²⁶ If a deprivation of property does not amount to a taking, there is no requirement to act reasonably in a substantive sense. If this is the model under Article 300A, all interferences would require the authority of law, but only eminent domain would require substantive reasonableness.

The second model is that of the European Convention on Human Rights. As explained above, the Convention right to property requires a “fair balance” for a taking of property. Crucially, in the landmark case *Sporrong and Lönnroth v. Sweden*, the Court held that the principle of the fair balance applies to all forms of interference with property, including those outside eminent domain.¹²⁷ In *Sporrong and Lönnroth*, the Court considered the City of Stockholm’s practice of issuing specific “expropriation notices” over lengthy and indefinite periods. There was no taking, but the issue of the notice reduced the value of the property to such an extent that the absence of compensation meant that it failed to strike a fair balance.¹²⁸

If Article 300A has a similar structure to the Convention right, the general standard of substantive reasonableness would apply to all interferences with private property. Plainly, there would be some types of takings where compensation would not be necessary to ensure reasonableness.¹²⁹ Indeed, there are circumstances where requiring compensation could defeat the purpose of a legitimate interference with private property. For example, it is not unreasonable to expect property owners to bear the full cost of the destruction of contraband in their possession.¹³⁰ However, Article 300A would still be relevant, as it requires public officers in both cases to stay within the scope of their legal authority to act; arguably, it may also require the penalty of destruction to be proportionate to the offence. Similarly, with bankruptcy, it is reasonable to allow officers of the State to seize property for distribution amongst creditors, without compensation to the debtor (other than the eventual extinction of their debts); arguably, reasonableness might not justify the

¹²⁵ This point was tested and upheld in *Eastern Enterprises v. Apfel*, 524 US 498 (1998).

¹²⁶ *Ibid.*

¹²⁷ *Sporrong and Lönnroth v. Sweden* (1982), ECHR 5.

¹²⁸ *Ibid.*, para. 69.

¹²⁹ See generally Tom ALLEN, *Property and the Human Rights Act 1998* (Oxford: Hart Publishing, 2005) at 180-193.

¹³⁰ *Ibid.* at 257-281.

seizure of assets of a more personal nature, but compensation would render the process of no real effect.¹³¹ Other cases fall into a grey area: when, for example, would the regulation of property for the public benefit impose an unreasonable burden on the owner? This question has vexed courts in many jurisdictions, and, if the standard of reasonableness applies to all forms of interference under Article 300A, it is likely to do so in India as well.

E. The Significance of a Distinct Right to Property

The Supreme Court's revival of the right to property brings India into line with the constitutional law of many other States. Nevertheless, it is a remarkable development, given the clear language and purpose of the *Forty-Fourth* and earlier *Amendments*. Not only has the Court revived the right to property as a substantive right, but it has done so in a liberal framework. Moreover, it found it necessary to express it as a distinct right. In terms of the construction of legal doctrine, it is not even clear why it thought it necessary to turn to Article 300A. As explained above, the line of authority beginning with *Maneka Gandhi* allows petitioners to use Articles 14, 19, and 21 to protect property from treatment that is "arbitrary", or not "fair, just and reasonable". Plainly, the *Maneka Gandhi* line of cases does not turn any of these Articles into a new right to property. Their functions are much broader than that. Nevertheless, it is clear that a property owner might look to these provisions to protect its interests in some cases. In addition, as the Court acknowledged in *K.T. Plantation*, the same standard applies under Article 300A. Given the breadth of Articles 14, 19, and 21, why did the Court find it necessary to construct Article 300A as a distinct substantive guarantee of a right to property?

The first explanation may be that the Court may feel that Articles 14, 19, and 21 leave gaps in the protection of property. The very fact that they are not written as rights to property would suggest that this is the case. However, it seems unlikely that a taking of property that imposed an unreasonable burden on the owner would not fall within the scope of Articles 14, 19 and 21. To be sure, the Court has been cautious about extending Article 21 to property.¹³² It is also true that Article 14, as written, is concerned with equality. However, in cases such *Tamil Nadu v. Ananthi Ammal*,¹³³ the Court has followed Bhagwati J.'s view that Article 14 covers any form of "arbitrary" action.¹³⁴ As this seems to include the payment of compensation that the Court thinks inadequate, it is clear that Article 14 could cover the ground of Article 300A. Furthermore, as the regulation of property could often be brought under Article 19(1)(g) as an interference with the carrying on an "occupation, trade or business", there would be few cases that could not be brought under one of Articles 14, 19, or 21. Indeed, in *I.R. Coelho*, the Court affirmed the *Maneka Gandhi* principle that the fundamental rights in Part III form a comprehensive, indivisible whole. *I.R. Coelho* involved a challenge to land reform legislation under Articles 14, 19, and 21; the Court held that the case could proceed, on the basis that:

¹³¹ See e.g. *Haig v. Aitken*, [2000] 3 WLR 1117.

¹³² See the cases cited *supra* note 80.

¹³³ E.g. *State of Tamil Nadu v. Ananthi Ammal*, *supra* note 85.

¹³⁴ See *supra* note 51 and accompanying text.

[i]t is evident that it can no longer be contended that protection provided by fundamental rights comes in isolated pools. On the contrary, these rights together provide a comprehensive guarantee against excesses by state authorities. Thus post-*Maneka Gandhi*'s case it is clear that the development of fundamental rights has been such that it no longer involves the interpretation of rights as isolated protections which directly arise but they collectively form a comprehensive test against the arbitrary exercise of state power in any area that occurs as an inevitable consequence.¹³⁵

From this, it seems unlikely that there are gaps. The Court could apply Articles 14, 19, and 21 to cover the ground of Article 300A, if it were minded to do so.

A second possible explanation considers the exclusions of judicial review contained in Articles 31A, 31B, and 31C. As explained above, in *Basantibai Fakirchand Khetan*, the Bombay High Court took the view that the exclusions do not apply to Article 300A. Hence, recourse to Article 300A seems to allow petitioners to side-step the constitutional exclusions of judicial review. This point was not discussed when the *Forty-Fourth Amendment* was discussed, perhaps because Article 300A was not expected to act as a constraint on legislative action. Neither was it discussed by the Supreme Court in the appeal in *Basantibai Fakirchand Khetan* or subsequent cases. However, if it is correct, Parliament could still amend Article 300A, or Articles 31A, 31B, or 31C, so as to extend the exclusions, but the tactical advantages of bringing a case under Article 300A rather than Articles 14, 19 and 21 would remain until such time as an amendment is enacted.

Plainly, the Supreme Court is convinced of the necessity of a distinct right to property, even though the Indian constitutional system provides alternative grounds of protection. One could argue that the Supreme Court has fallen into the "formalist trap", to use Gregory Alexander's expression. As Alexander argues, the existence or form of a constitutional right to property does not determine the vulnerability of property to legislative action.¹³⁶ Other doctrines and principles and the "background nonconstitutional legal and political traditions and culture" can provide owners with the security of a right to property.¹³⁷ This certainly seems to be the case in India, even if the potential advantages of using Article 300A to circumvent Articles 31A, 31B, and 31C are taken into account. It seems that the real reason for locating a right to property in Article 300A is more symbolic. Several generations of judges have held onto the liberal idea that property defines an area of autonomy that should be safeguarded from state power. For these judges, property is not merely an instrument for enabling the exercise of other forms of autonomy. The zone of autonomy protected by property law has a quality that is distinct and important in itself. As such, it should be recognised as a distinct right, even if creative interpretation would protect property through other fundamental rights. In effect, recognising a right to property as a distinct right has a declarative and educative role in addition to its instrumental role in constitutional litigation.

III. THE REVIVAL OF THE RIGHT TO PROPERTY IN INDIAN POLITICS

¹³⁵ I.R. Coelho, *supra* note 100 at para. 61.

¹³⁶ Gregory S. ALEXANDER, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (Chicago: University of Chicago Press, 2006) at 24.

¹³⁷ *Ibid.* at 26.

The revival of the right to property has attracted relatively little attention in political and legal circles. Political rhetoric over property is much more muted than in earlier periods, partly because none of the leading parties have called for the redistribution of land or the nationalisation of key industries in recent years.¹³⁸ Indeed, there has been some commentary calling for reversal of the *Forty-Fourth Amendment*, even though the right to property as it stood immediately before the *Amendment* was weaker than the right that has been constructed from Article 300A (and Article 14).¹³⁹ The *Amendment* has even been the subject of public interest litigation: in *Sanjiv Kumar Agarwal v. Union of India*, the Supreme Court dismissed a petition for a declaration the *Amendment*'s repeal of the right to property was contrary to the basic structure.¹⁴⁰ This was noted in the press, along with the Court's recent declarations that property is a human right.¹⁴¹ However, the debate has been remarkably quiet, especially in comparison with the debates before World War II and during Indira Gandhi's governments before the Emergency. In both periods, Congress felt threatened by the rise of mass movements on the left, and made promises of land and economic reform helped to capture support from more radical parties.¹⁴² By contrast, there has been very limited mobilisation on the left in recent years, even though one might argue that the social conditions for it are present. Indeed, the distribution of wealth has become more concentrated in recent years,¹⁴³ and has been

¹³⁸ See Burt NEUBORNE, "The Supreme Court of India" (2003) 1 International Journal of Constitutional Law 476 at 479, n. 16: "With the fall of the Soviet Union and the increasing reliance on markets as the dominant form of economic organization, little or no effort has been made by the Indian parliament to impose radical restrictions on private property." See also Wahi, *supra* note 3.

¹³⁹ See e.g. M.L. SINGHAL, "Right to Property and Compensation Under the Indian Constitution" (1995) 1(2) Judicial Training and Research Institute Journal, online: Judicial Training and Research Institute <<http://www.ijtr.nic.in/articles/art41.pdf>>; Vyshnavi NEELAKANTAPILLAI, "Right to Property under the Indian Constitution" *Lawyers Club India* (7 March 2011), online: Lawyers Club India <<http://www.lawyersclubindia.com/articles/Right-to-Property-under-the-Indian-Constitution-3515.asp>> (last accessed 16 November 2014); Sushanth SALIAN, "History of the Removal of the Fundamental Right to Property" (2002) Centre for Civil Society Working Paper No. 0041, online: Centre for Civil Society <<http://ccs.in/working-papers-rule-law>>; R. JAGANNATHAN, *Land Bill is placebo; real cure is restoring Right to Property*, *Firstpost* (5 September 2013), online: Firstpost <<http://www.firstpost.com/economy/land-bill-is-placebo-real-cure-is-restoring-right-to-property-1081261.html>>. The Good Governance India Foundation's web site has a collection of news articles on the deletion of the right to property: see Good Governance India Foundation, "Our Campaign – Other Links", online: Good Governance India Foundation <http://www.goodgovernanceindia.com/otherlinks_ourcampaign.html>.

¹⁴⁰ *Sanjiv Kumar Agarwal v. Union of India*, (18 October 2010), Writ Petition (Civil) No. 464 of 2007 (no reasons given; a description of the hearing is given at J. VENKATESAN, "Court Rejects Plea to Make Property a Fundamental Right" *The Hindu* (19 October 2010), online: The Hindu <<http://www.thehindu.com/news/national/court-rejects-plea-to-make-property-a-fundamental-right/article836599.ece>>).

¹⁴¹ See Venkatesan, *supra* note 140.; Good Governance India Foundation, *supra* note 139.

¹⁴² Gyanendra PANDRY, "Congress and the Nation, 1917-1947" in Richard SISSON and Stanley WOLPERT, eds., *Congress and Indian Nationalism: The Pre-Independence Phase* (Berkeley: University of California Press, 1988) 121; D.A. LOW, "Congress and Mass Contacts, 1936-37: Ideology, Interests, and Conflict over the Basis of Party Representation" in Sisson and Wolpert, eds., *ibid.*, 134.

¹⁴³ Parthapratim PAL and Jayati GHOSH, "Inequality in India: A Survey of Recent Trends" DESA Working Paper No. 45, online: UN <http://www.un.org/esa/desa/papers/2007/wp45_2007.pdf>; see also Stuart CORBRIDGE, John HARRISS, and Craig JEFFREY, *India Today: Economy, Politics and*

blamed in part for the lack of progress in public health and education.¹⁴⁴ Peasant and agricultural labor movements still exist, and there is still a continuing communist insurgency in West Bengal. However, these movements have been unable to secure significant changes in national policies on wealth distribution or social provisioning.¹⁴⁵ The failure of these movements to gain influence in mainstream politics, and the association of economic growth with liberalisation, make it unlikely that socialist or redistributive policies would become central to the policies of the main parties.

The absence of an influential mass movement from the left may explain why social democrat ideas of solidarity have little impact on national politics. The general picture across India is one in which the middle classes do not look to the State as a source of employment, education or health, and do not see value in public sector social provisioning as part of a political “bargain”.¹⁴⁶ By contrast, at independence, a growing state sector in industry was expected to provide new opportunities for employment for the educated middle class, and was supported by them for that reason.¹⁴⁷ Currently, many of the middle class have sufficient wealth to provide for themselves without resort to state services; where they do rely on public services, they often monopolise provision and direct investment.¹⁴⁸ For example, state investment in primary and secondary schools is low and the quality of education is poor. However, investment is greater in higher education, where the middle class dominate.¹⁴⁹ Patrick Heller argues that:

[i]f the Congress System allowed for class accommodation, liberalization has polarized class positions. The dominant classes, which benefited the most from developmental investments of the Nehruvian state (especially in state employment and support for higher education), now actively reject the very notion of the affirmative, equity-enhancing state.¹⁵⁰

It is not even clear that there is any shared sense of the meaning of social justice or in the value of solidarity, whether or not it is expressed in political life. Hence, the brief statements in *K.T. Plantation* that social justice might justify something less than full

Society (Cambridge: Polity, 2012) at 69 (“it is clear that economic growth in India since 1990 has worked extremely well for its best-off households.”)

¹⁴⁴ Abhijit BANERJEE and Lakshmi IYER, “History, Institutions, and Economic Performance: The Legacy of Colonial Land Tenure Systems in India” (2005) 95 *The American Economic Review* 1190. See Pal and Ghosh, *supra* note 143; Corbridge, Harriss, and Jeffrey, *supra* note 143; Kohli, “State”, *supra* note 34 at 187; Poulomi CHAKRABARTI and Dinsha MISTREE, “Disaggregating Social Development: The Variant Politics of Education and Healthcare in India” (20 August 2013), online: Princeton University <http://www.princeton.edu/~dmistree/DSD_8_20.pdf>; Monica Das GUPTA, “Public Health in India: Dangerous Neglect” 40(9) *Economic and Political Weekly* 5159.

¹⁴⁵ See, for example, Harriss, “Politics”, *supra* note 34 at 216: “The farmers’ movements that acquired significant political clout in the 1980s were vehicles primarily of the interests of the wealthier and more highly commercialized cultivators beneath the veil of a struggle on behalf of the disfavored majority of rural ‘bharat’ against urban India.”

¹⁴⁶ Perna SINGH, *Public Goods Provision and Social Development in India*, in Kohli and Singh, eds., *supra* note 30, 230.

¹⁴⁷ Nayar, *supra* note 28 at 205-06.

¹⁴⁸ Patrick HELLER, “Democratic Deepening in India and South Africa” (2009) 44 *Journal of Asian and African Studies* 123 at 139.

¹⁴⁹ Oishik SIRCAR, “Spectacles of Emancipation: Reading Rights Differently in India’s Legal Discourse” (2012) 49 *Osgoode Hall Law Journal* 527 at 540.

¹⁵⁰ Heller, *supra* note 148 at 139.

compensation were not made in a context in which this might be understood. Instead of a spirit of solidarity:

[o]n a day-to-day basis, the Indian citizen engages with the State either as a client or as a member of a group, but not as a rights-bearing citizen. Engagement is predicated on exchanges, not rights. Demands on the State are made through bribes, by appeals to caste or communal solidarities or through the influence of powerful interest groups.¹⁵¹

It would be inaccurate, however, to suggest that the Court and Parliament lost interest in social justice in recent years. Congress won a large block of seats in the *Lok Sabha* in 2004 and formed a coalition government with a number of other center-left parties. The coalition, known as the United Progressive Alliance, produced a “Common Minimum Programme” that promised improvements in social welfare.¹⁵² This included greater land security for the Scheduled Castes and Scheduled Tribes and a promise that existing land ceilings and redistribution legislation would be implemented. The general orientation of the Common Minimum Programme was compatible with much of the Court’s activity in this period. Indeed, recourse to the Court has been an important tactic for “policy entrepreneurs” with an interest in social justice, with success before the Court often providing the basis for legislation directed at the relief of poverty.¹⁵³ For example, public interest litigation helped to advance progressive legislation such as the *Mahatma Gandhi National Rural Employment Guarantee Act, 2005*,¹⁵⁴ the *Right of Children to Free and Compulsory Education Act, 2009*,¹⁵⁵ and the *National Food Security Act, 2013*.¹⁵⁶ However, the impact of these developments is difficult to assess. While it is clear that neither the Supreme Court nor Parliament is blind to the issues of social justice, the broader picture is ambiguous. Varun Gauri has demonstrated that success rates in fundamental rights cases for socially advantaged groups has steadily increased over the last fifty years; by contrast, success rates for disadvantaged groups have declined.¹⁵⁷ Moreover, judgments on social issues have an ad hoc quality that makes it difficult to co-ordinate other legislative and administrative actions.¹⁵⁸ Some of these difficulties are felt most acutely at the local level, where implementation takes place. The result is that, like land redistribution in the first decades after Independence, progress can depend on the willingness of local elites to support change.

¹⁵¹ *Ibid.* at 138.

¹⁵² Government of India, *National Common Minimum Programme of the Government of India* (May 2004).

¹⁵³ John HARRISS, “Audacious Reforms? India’s New Rights Agenda: An Introduction” (2013) 86 *Pacific Affairs* 561-568 [Harriss, “Audacious Reforms?”].

¹⁵⁴ *Mahatma Gandhi National Rural Employment Guarantee Act, 2005*, No. 42 of 2005.

¹⁵⁵ *Right of Children to Free and Compulsory Education Act, 2009*, No. 35 of 2009.

¹⁵⁶ *National Food Security Act, 2013*, No. 20 of 2013. On the recent legislation, see Sanjay RUPARELIA, “India’s New Rights Agenda: Genesis, Promises, Risks” (2013) 86 *Pacific Affairs* 569-590; Lauren BIRCHFIELD and Jessica CORSI, “Between Starvation and Globalization: Realizing the Right to Food in India” (2010) 31 *Michigan Journal of International Law* 691.

¹⁵⁷ Varun GAURI, “Public Interest Litigation in India: Overreaching or Underachieving?” (2010) 1 *Indian Journal of Law and Economics* 71 at 86 (but cf. Daniel M. BRINKS and Varun GAURI, “The Law’s Majestic Equality? The Distributive Impact of Litigating Social and Economic Rights” (2012) *World Bank Policy Research Working Paper* No. 5999).

¹⁵⁸ Pranab BARDHAN, “Challenges for a Minimum Social Democracy in India” (2011) 46(10) *Economic and Political Weekly* 39.

It is therefore not yet clear whether these innovations mark a lasting change in the politics of redistribution. In general, the legislation uses forms of indirect and limited redistribution to address poverty, rather than direct forms of redistribution. As John Harriss observes, the emphasis is more on “the provision of social welfare, or social protection — a ‘safety net,’ substantially funded from enhanced tax revenues — than it is on social development.”¹⁵⁹ As observed above, the risk is that social justice is subordinated to the willingness of the better-off to acquiesce to higher taxes, and yet this is the position that the Court seems to be moving toward.¹⁶⁰ Indeed, some commentators have noted that measures to improve social provisioning are followed by measures that enable privatisation. For example, the *Right of Children to Free and Compulsory Education Act, 2009* was soon followed by *Foreign Education Institutions (Regulation of Entry and Operations) Bill, 2010*, which would have allowed for greater exclusivity of tertiary education.¹⁶¹ Overall, legislation seeks to ameliorate the very worst effects of the market economy, but without building a broader base of solidarity and social obligation and without seeking to break down concentrations of wealth.

The dominance of causes that favor the better-off has, in some cases, directly increased land insecurity of the poor. Over the last decade or so, there have been a number of controversial large-scale evictions from land. Most of these have been in support of a planned development, with many owned and operated by private enterprise.¹⁶² However, not all developments have been private: the Narmada Dams project is probably the best-known example of a public project that has resulted in widespread evictions. Estimates vary, but it is estimated that many tens of thousands of people have been displaced or lost livelihoods as a result of the construction of an extensive network of dams and canals on the Narmada River system.¹⁶³

Some evictions have not been for development: for example, in 2002, the Ministry of Environment and Forests ordered states to remove “encroachers” on forest land, in order

¹⁵⁹ Harriss, “Audacious Reforms”, *supra* note 153.

¹⁶⁰ *Supra* note 123 and accompanying text.

¹⁶¹ Sircar, *supra* note 149. *The Foreign Education Institutions (Regulation of Entry and Operations) Bill, 2010* is unlikely to be enacted, as the same ends are likely to be achieved by ministerial order: see Alya MISHRA, “Access for Foreign Campuses as Legislation ‘Abandoned’” 287 *University World News* (12 September 2013), online: [University World News <http://www.universityworldnews.com/article.php?story=20130912115621960>](http://www.universityworldnews.com/article.php?story=20130912115621960).

¹⁶² Tania Murray LI, “To Make Live or Let Die? Rural Dispossession and the Protection of Surplus Populations” (2010) 41 *Antipode Issue Supplement* 66; Colin GONSALVES, “Judicial Failure on Land Acquisition for Corporations” (2010) 45(32) *Economic and Political Weekly* 37.

¹⁶³ On the estimates, see S. PARASURAMAN, Himanshu UPADHYAYA and Gomathy BALASUBRAMANIAN, “Sardar Sarovar Project: The War of Attrition” (2010) 45(5) *Economic and Political Weekly* 39 at 41; M.J. PETERSON, “Narmada Dams Controversy – Case Summary” (2010) *International Dimensions of Ethics Education in Science and Engineering Case Study Series* at 22, online: <http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1015&context=edethicsinscience>; and see Balakrishnan RAJAGOPAL, “The Role of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India” (2006) 18 *Leiden Journal of International Law* 345; Smita NARULA, “The Story of Narmada Bachao Andolan: Human Rights in the Global Economy and the Struggle Against the World Bank” in Deena R. HURWITZ, Margaret L. SATTERTHWAITE, and Douglas B. FORD, eds., *Human Rights Advocacy Stories* (New York: Foundation Press, 2009) 351.

to pursue environmental objectives.¹⁶⁴ As a result, large numbers of indigenous peoples were removed from their traditional areas.¹⁶⁵ Similarly, in *Almitra H. Patel v. Union of India*, the Court seemed to regard slum clearance as the solution to urban sanitation problems, as it issued orders for the removal of many of Delhi's slum dwellers without requiring prior guarantees of adequate substitute housing.¹⁶⁶ In effect, the presence of the poor seems, by itself, to threaten the quality of life expected by the better-off. These expectations have been expressed through Article 21 as a right to a safe environment; in *Almitra H. Patel*, the right to a safe environment was implicitly given priority over right to livelihood. Even so, environmental objectives are not given the highest priority by the Court. Prashant Bhushan observes that:

when environmental protection comes into conflict with socio-economic rights of the poor and the marginalized, the poor usually get the short shrift and, two, when environmental protection comes into conflict with powerful vested commercial and corporate interests or what is perceived by the court to be 'development', environmental protection is given the short shrift.¹⁶⁷

In practice, the Supreme Court has been much more reluctant to order the eviction of large commercial enterprises for environmental reasons than the poor.¹⁶⁸

These evictions are often especially harsh because resettlement and rehabilitation packages are insufficient. Implementation of packages is poor, and in many cases they do not apply to many of the displaced.¹⁶⁹ Compensation, when it is available, often does not provide for the loss of social capital associated with the loss of community.¹⁷⁰ As Article

¹⁶⁴ Ministry of Environment and Forests, Government of India, No. 7-16/2002-FC, 3 May 2002.

¹⁶⁵ Oliver SPRINGATE-BAGINSKI, Madhu SARIN, and M. Gopinath REDDY, "Resisting Rights: Forest Bureaucracy and the Tenure Transition in India" (2013) 12 Small-Scale Forestry 107 at 111 (discussing reports that hundreds of thousands of forest dwellers were evicted).

¹⁶⁶ *Almitra H. Patel v. Union of India*, AIR 2000 SC 1256 [*Patel*]. See S. CHAPLIN, "Cities, Sewers and Poverty: India's Politics of Sanitation" (1999) 11 Environment and Urbanization 145; Prashant BHUSHAN, "Misplaced Priorities and Class Bias of the Judiciary" (2009) 44(14) Economic and Political Weekly 32; Gautam BHAN, "'This Is No Longer the City I Once Knew'. Evictions, the Urban Poor and the Right to the City in Millennial Delhi" (2009) 21 Environment and Urbanization 127; Rakesh SHUKLA, "Rights of the Poor: An Overview of Supreme Court" (2006) 41(35) Economic and Political Weekly 3755.

¹⁶⁷ Bhushan, *supra* note 167 at 35; Chaplin, *supra* note 167; G. WILLIAMS and E. MAWDSLEY, "Postcolonial Environmental Justice: Government and Governance in India" (2006) 37 Geoforum 660; and see the Court's comments on the precautionary principle in *Narmada Bachao Andolan v. Union of India*, AIR [2000] SC 3751; 2000 10 SCC 664 at para. 149-151. See also Rajamani & Sengupta, *supra* note 23 at 89-90: the real issue with these cases is the lack of judicial craft, as judgments on environmental rights are poorly explained and exhibit little more than a "jurisprudence of exasperation".

¹⁶⁸ Compare *Patel*, *supra* note 166 at 1258, where the Court stated that "[r]ewarding an encroacher on public land with free alternate site is like giving a reward to a pickpocket", with the reluctance to evict large corporate enterprises in illegal developments in *T.N. Godavarman Thirumulpad v. Union Of India* [1997] 2 SCC 267.

¹⁶⁹ Walter FERNANDES, "India's Forced Displacement Policy and Practice: Is Compensation up to Its Functions?" in Michael M. CERNEA and Hari Moham MATHUR, eds., *Can Compensation Prevent Impoverishment? Reforming Resettlement Through Investment and Benefit-Sharing* (Oxford: Oxford University Press, 2008) 181 at 181-207 (across India, only about one-third of those displaced by development projects are resettled as part of the project).

¹⁷⁰ David W. PEARCE and Timothy SWANSON, "The Economic Evaluation of Projects Involving Forced Population Displacements" in Cernea and Mathur, eds., *supra* note 169, 99 at 111-112.

31 was often raised in the context of land redistribution, one might ask whether the revival of the right to property might provide a basis for challenging land grabs. However, it is not clear how far recent evictions can be attributed to the weakness of expropriatory legislation, and especially to weaknesses that might be challenged under Article 300A. For example, the *Land Acquisition Act, 1894* required compensation at market value¹⁷¹ with an additional solatium of up to 30 percent,¹⁷² and only allowed takings for a “public purpose”.¹⁷³ On its face, this appears to satisfy the requirements of Article 300A, as set out in *K.T. Plantation*. More recently, the *Land Acquisition, Rehabilitation and Resettlement Act, 2013* was enacted to strengthen the position of landowners and occupiers.¹⁷⁴ Before an acquisition takes place under the Act, a “Social Impact Assessment Study” must be completed, to determine issues regarding the purpose of acquisition and the rights of affected families.¹⁷⁵ Compensation is considerably more generous than under the 1894 Act: owners of land in rural areas are entitled to a minimum of four times the market value of the land; in urban areas, the entitlement is double the market value.¹⁷⁶ Rehabilitation must be provided for all “affected families”, whether or not they own land that is acquired.¹⁷⁷ One important innovation requires an acquisition for private companies to receive the prior consent of at least 80 percent of “affected families”; in the case of acquisitions for “public private partnership projects”, the figure is 70 percent.¹⁷⁸

These are significant measures, but whether the new Act will have the desired impact is uncertain. Critics have asked whether a market-based standard for compensation will help the very poor if reliable information on prices for land is lacking.¹⁷⁹ Market valuation may not reflect the value of the location to occupants, especially if it is the basis of access to a community that provides economic opportunity and social support.¹⁸⁰ In any case, where land use and occupation is treated as illegal (as in *Almitra H. Patel*), there is no need to compensate for land; whether rehabilitation is required for the loss of a livelihood that depends on illegal access is uncertain. The new consent requirement is significant, but given that the protests over the use of the old legislation often concerned oppressive or corrupt practices, there is the risk that it will make occupiers more

¹⁷¹ *Land Acquisition Act, 1894*, No. 1 of 1894, ss. 11 and 23(1).

¹⁷² *Ibid.*, ss. 11 and 23(2).

¹⁷³ *Ibid.*, s. 6.

¹⁷⁴ *Land Acquisition, Rehabilitation and Resettlement Act, 2013*, No. 30 of 2013. See Maitreesh GHATAK and Parikshit GHOSH, “The Land Acquisition Bill: A Critique and a Proposal” (2011) 46(41) *Economic and Political Weekly* 65; Swagato SARKAR, “The Impossibility of Just Land Acquisition” (2011) 46(41) *Economic and Political Weekly* 35; Amitendu PALIT, “The Land Acquisition, Resettlement and Rehabilitation (LARR) Bill 2011: Providing Solutions or Raising Questions?” (2012) 4(7) *Journal of Emerging Knowledge on Emerging Markets*, online: JEKEM <<http://digitalcommons.kennesaw.edu/jekem/vol4/iss1/7/>>; Baibhaw GAHLAUT, “Land Acquisition and Resettlement and Rehabilitation Bill 2011 – A Bane or Boon?” (2013) 34(2) *Statute Law Review* 175 at 177.

¹⁷⁵ *Land Acquisition, Rehabilitation and Resettlement Act, 2013*, *supra* note 174, c. II.

¹⁷⁶ *Ibid.*, sched. 1.

¹⁷⁷ *Ibid.*, sched. 2.

¹⁷⁸ *Ibid.*, s. 2(2)(b)(i); the Act does not define “public private partnership project” (or “public private partnership” or “partnership”).

¹⁷⁹ See Gahlaut, *supra* note 174 at 177.

¹⁸⁰ See Pearce and Swanson, *supra* note 170.

vulnerable to coercive tactics.¹⁸¹ More worrying is the lack of institutional reform: as Namita Wahi has argued, the arbitrariness of land acquisition proceedings has been a serious issue in India, and legal reform without institutional reform will do little to address the crony capitalism and collusion with the governing class and industry that puts the most vulnerable at risk.¹⁸²

Over the longer term, the impact of the Act and other legislation will depend on the role of solidarity and social justice in Indian political life, as well as institutional development. For this reason, it seems unlikely that the revived right to property will contribute to the development of a more progressive agenda.

V. CONCLUSION

Indian politics is characterised by a confusing mix of liberalisation and social concern. However, measures to protect the poor, such as the *Land Acquisition, Rehabilitation and Resettlement Act, 2013*, rarely threaten the interests of the better-off. Indeed, it is worth noting that none of the cases leading to the revival of a right to property concerned land grabs aimed at weaker parties: instead, as with the original Articles 19(1)(f) and 31, the revived right to property is far more likely to be invoked by those with more extensive property holdings. For example, *I.R. Coelho*, *Glanrock Estates* and *K.T. Plantation* concern long-running challenges to land reform legislation.¹⁸³ As in the pre-*Kesavananda* era, the right to property is more likely to be employed by those who seek to challenge progressive laws. Whether this proves controversial, and whether the judges will find themselves blamed for a lack of progress on social justice, remains to be seen. However, with economic liberalisation still dominating Indian policy, it seems unlikely that the judges will find themselves under pressure from their political counterparts, at least in the near future. At the same time, the Supreme Court's emphasis on liberal entitlement, rather than solidarity or social obligation, is likely to deny the new right to property of relevance in cases where social justice is paramount.

¹⁸¹ Sarkar, *supra* note 174.

¹⁸² Wahi, *supra* note 3.

¹⁸³ *I. R. Coelho*, *supra* note 100, *Glanrock Estates*, *supra* note 101 and *K.T. Plantation*, *supra* note 92 all concerned the application of laws imposing ceilings on the size to large estates.